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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. SERGIO MORA, Defendant.	CASE NO. 08CR1090-H DATE: May 19, 2008 TIME: 2:00 p.m. GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO: (1) COMPEL DISCOVERY; (2) SUPPRESS STATEMENTS; AND (3) GRANT LEAVE TO FILE FURTHER MOTIONS.

COMES NOW, the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Luella M. Caldito, Assistant United States Attorney, and hereby files its Response in Opposition to Defendant's above-referenced Motions. This Response is based upon the files and records of this case.

I

STATEMENT OF THE CASE

On April 8, 2008, a federal grand jury in the Southern District of California returned an Indictment charging Sergio Mora ("Defendant") with Attempted Entry After Deportation, in violation of Title 8, United States Code, Section 1326 (a) and (b). The Indictment further alleges that Defendant had been removed from the United States subsequent to January 22, 2001. Defendant was arraigned on the Indictment on April 9, 2008 and pled not guilty to the Indictment.

II

STATEMENT OF FACTS

A. THE INSTANT OFFENSE

On March 5, 2008, Border Patrol Agent Sebastian Fernandez was assigned to patrol an area known as "TC Worthy," which is located approximately 50 yards north of the United States/Mexico international boundary and 100 yards west of the Tecate California Port of Entry. At approximately 6:40 a.m., an infrared scope operator alerted Agent Fernandez to possible illegal alien traffic in his area of patrol. Agent Fernandez proceeded to a nearby parking lot and spotted three individuals trying to hide behind some cars. Agent Fernandez approached the individuals, including Defendant, and conducted a field interview. Defendant admitted that he was a citizen and national of Mexico without any legal documentation to enter or remain in the United States.

Defendant was arrested and transported to the Brown Field Border Patrol Station for processing, where his fingerprints were entered into the Automated Biometric Identification System (IDENT) and the Integrated Automated Fingerprint Identification System (IAFIS). Defendant's identity was confirmed, along with his criminal and immigration histories.

At approximately 4:00 p.m., Defendant was advised of his Miranda rights and invoked his right to remain silent.

B. DEFENDANT'S IMMIGRATION HISTORY

Defendant is a citizen of Mexico who was ordered deported by an Immigration Judge on or about July 6, 2005. Defendant was removed from the United States to Mexico on at least nine occasions, including on January 7, 2008 via the San Ysidro, California Port of Entry.

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III

ARGUMENT

A. THE UNITED STATES HAS AND WILL COMPLY WITH ITS DISCOVERY OBLIGATIONS

The United States has and will continue to fully comply with its discovery obligations. To date, the United States has produced 63 pages of discovery to Defendant's counsel and a DVD recording of Defendant's post-arrest interview. As of today, the United States has received no reciprocal discovery. Counsel believes that all discovery disputes can be resolved amicably and informally in this case. In view of the below-stated position of the United States concerning discovery, it is respectfully requested that no orders compelling specific discovery by the United States be made at this time. The Government has no objection to the preservation of evidence for a reasonable time period

1. Defendant's Statements

The United States recognizes its obligation under Federal Rules of Criminal Procedure ("Rules") 16(a)(1)(A) and 16(a)(1)(B) to provide to Defendant any written statements and the substance of Defendant's oral statements. The United States has produced all of Defendant's statements that are known to the undersigned Assistant U.S. Attorney at this time. If the United States discovers additional oral or written statements that require disclosure under the relevant Rules, such statements will be promptly provided to Defendant.

The United States does not object to the request for arrest reports and has already produced to Defendant all arrest reports known to the United States at this time.

The United States has no objection to the preservation of the handwritten notes taken by any of the Government's agents and officers. See United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976) (agents must preserve their original notes of interviews of an accused or prospective government witnesses). However, the United States objects to providing Defendant with a copy of any rough notes at this time. Rule 16(a)(1)(A) does not require disclosure of the rough notes where the content of those notes have been accurately reflected in a type-written report. See United States v. Brown, 303 F.3d 582, 590 (5th Cir. 2002); United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000) (Rule 16(a)(1)(A) does not require disclosure of an agent's notes even where there are "minor discrepancies" between the notes and a report). The Government is not required to produce rough notes pursuant to the Jencks Act, because the notes do not constitute "statements" (as defined 18 U.S.C. § 3500(e)) unless the notes (1) comprise both a substantially verbatim narrative of a witness' assertion, and (2) have been approved or adopted by the witness. United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980). The rough notes in this case do not constitute "statements" in accordance with the Jencks Act. See United States v. Ramirez, 954 F.2d 1035, 1038-39 (5th Cir. 1992) (rough notes were not statements under the Jencks Act where notes were scattered and all the information contained in the notes was available in other forms). The notes are not Brady material because the notes do not present any material exculpatory information, or any evidence favorable to Defendant that is material to guilt or punishment. Brown, 303 F.3d at 595-96 (rough notes were not Brady material because the notes were neither favorable to the defense nor material to defendant's guilt or punishment); United States v. Ramos, 27 F.3d 65, 71 (3d Cir. 1994) (mere speculation that agents' rough notes contained Brady evidence was insufficient). If, during a future evidentiary hearing, certain rough notes become discoverable under Rule 16, the Jencks Act, or Brady, the notes in question will be provided to Defendant.

2. Brady Material

The United States is well aware of and will continue to perform its duty under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976), to disclose exculpatory evidence within its possession that is material to the issue of guilt or punishment. Defendant, however, is not entitled to all evidence known or believed to exist which is, or may be, favorable to the accused, or which pertains to the credibility of the United States' case. As stated in United States v. Gardner, 611 F.2d 770 (9th Cir. 1980), it must be noted that "the prosecution does not have a constitutional duty to disclose every bit of information that might affect the jury's decision; it need only disclose information favorable to the defense that meets the appropriate standard of materiality." Id. at 774-775 (citation omitted).

The United States will turn over evidence within its possession which could be used to properly impeach a witness who has been called to testify.

Although the United States will provide conviction records, if any, which could be used to impeach a witness, the United States is under no obligation to turn over the criminal records of all witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976). When disclosing such information, disclosure need only extend to witnesses the United States intends to call in its case-in-chief. United States v. Gering, 716 F.2d 615, 621 (9th Cir. 1983); United States v. Angelini, 607 F.2d 1305, 1309 (9th Cir. 1979).

Finally, the United States will continue to comply with its obligations pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

3. Defendant's Criminal History and Rule 404(b) Evidence

The United States has provided Defendant with a copy of Defendant's known prior criminal record under Rule 16(a)(1)(D). See United States v. Audelo-Sanchez, 923 F.2d 129, 130 (9th Cir. 1990). Should the United States determine that there are any additional documents pertaining to Defendant's prior criminal record, those will be promptly provided to Defendant.

The United States will disclose, in advance of trial, the general nature of any "other bad acts" evidence that the United States intends to introduce at trial pursuant to Federal Rule of Evidence 404(b).

4. Evidence Seized

The United States has complied and will continue to comply with Rule 16(a)(1)(C) in allowing Defendant an opportunity, upon reasonable notice, to examine, copy and inspect physical evidence which is within the possession, custody or control of the United States, and which is material to the preparation of Defendant's defense or are intended for use by the United States as evidence in chief at trial, or were obtained from or belong to Defendant, including photographs.

5. Exculpatory Statements and Co-Conspirator Statements

As stated above, the United States will disclose exculpatory evidence within its possession that is material to the issue of guilt or punishment. Additionally, the United States will disclose any co-conspirator statements that the United States intends to use at trial.

6. Tangible Objects

The United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy tangible objects that are within its possession, custody, or control, and that is either material to the preparation of Defendant's defense or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant. The United States, however, need not produce rebuttal evidence in advance of trial. See United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

7. Fingerprint Expert Results, Reports and Other Documents

The United States will comply with Rule 16(a)(1)(G) and provide Defendant with a written summary of any expert testimony that the United States intends to use during its case-in-chief at trial under Federal Rules of Evidence 702, 703 or 705. Additionally, the United States will produce any reports generated by the fingerprint expert.

8. Scientific Tests or Experiments

Defendant requests the results of any scientific or other tests or examinations in connection with this case. The United States will disclose to Defendant the name, qualifications, and a written summary of testimony of any expert the United States intends to use during its case-in-chief at trial pursuant to Fed. R. Evid. 702, 703, or 705.

Although the defense requests a DEA-7 form, such a form does not exist in this attempted illegal reentry case.

9. Jencks Act Material

The United States will comply with its discovery obligations under the Jencks Act, Title 18, United States Code, Section 3500, and as incorporated in Rule 26.2.

10. Rough Notes

The United States has no objection to the preservation of the handwritten notes taken by any of the Government's agents and officers. See United States v. Harris, 543 F.2d 1247, 1253 (9th Cir. 1976) (agents must preserve their original notes of interviews of an accused or prospective government witnesses). However, the United States objects to providing Defendant with a copy of any rough notes at this time. Rule 16(a)(1)(A) does not require disclosure of the rough notes where the content of those notes have been accurately reflected in a type-written report. See United States v. Brown, 303 F.3d 582, 590 (5th Cir. 2002); United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000) (Rule 16(a)(1)(A) does not require disclosure of an agent's notes even where there are "minor discrepancies" between the notes and a report). The Government is not required to produce rough notes pursuant to the Jencks Act, because the notes do not constitute "statements" (as defined 18 U.S.C. § 3500(e)) unless the notes (1) comprise both a substantially verbatim narrative of a witness' assertion, and (2) have been approved or adopted by the witness. United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980). The rough notes in this case do not constitute "statements" in accordance with the Jencks Act. See United States v. Ramirez, 954 F.2d 1035, 1038-39 (5th Cir. 1992) (rough notes were not statements under the Jencks Act where notes were scattered and all the information contained in the notes was available in other forms). The notes are not Brady material because the notes do not present any material exculpatory information, or any evidence favorable to Defendant that is material to guilt or punishment. Brown, 303 F.3d at 595-96 (rough notes were not Brady material because the notes were neither favorable to the defense nor material to defendant's guilt or punishment); United States v. Ramos, 27 F.3d 65, 71 (3d Cir. 1994) (mere speculation that agents' rough notes contained Brady evidence was insufficient). If, during a future evidentiary hearing, certain rough notes become discoverable under Rule 16, the Jencks Act, or Brady, the notes in question will be provided to Defendant.

B. DEFENDANT'S FIELD STATEMENTS ARE ADMISSIBLE

Defendant moves to suppress his statements by arguing that the statements were obtained in violation of Miranda and that the statements were involuntary. Defendant did not make any post-Miranda statements. Thus, the only statements at issue are the statements made by Defendant during a field interview. As shown below, Defendant's motion should be denied.

Statements made in response to interrogation while a suspect is in custody may be inadmissible if made absent Miranda warnings. "A defendant is in custody when, based upon review of all pertinent facts, a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave." United States v. Wauneka, 770 F.2d 1434, 1438 (9th Cir. 1985). Specifically, courts must determine "whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318, 322 (1994) (per curium). If a person is merely subjected to a brief investigatory detention, he or she is not entitled to Miranda warnings. See, e.g., United States v. Casimiro-Benitez, 533 F.2d 1121, 1124 (9th Cir. 1976) (questions regarding alienage are permissible as general on the scene inquiries where defendant is suspected of illegal entry).

Additionally, where agents apprehend a significant number of suspects and question them in public regarding their alienage and citizenship prior to arrest, this is not a custodial interrogation under Miranda. United States v. Galindo-Gallegos, 244 F.3d 728, 732 (9th Cir. 2001). In Galindo-Gallegos, two agents chased and detained 15 to 20 people suspected of illegal entry in a rural area near the border. Id. at 729. Prior to Miranda warnings, agents asked the suspects what country they were from and whether they had a legal right to be in the United States. Id. The Ninth Circuit held there was no custodial interrogation because the number of witnesses, and the fact that the questioning took place in public, eliminated any risk of misconduct on the part of the agents to overcome the suspects' will. Id. at 732.

Similarly, in United States v. Cervantes-Flores, 421 F.3d 825, 828, 830 (9th Cir. 2005), a Border Patrol agent observed the defendant walking along the side of a highway known to be a smuggling route approximately 40 miles north of the United States/Mexico border. When it appeared that the defendant observed the marked Border Patrol vehicle, he fled. Id. at 828. The agent jumped from his vehicle and chased the defendant into the desert for approximately three-quarters of a mile. Id. Upon catching up with him, the agent subdued and handcuffed the defendant. Id. Without giving any Miranda warnings, the agent asked the defendant his citizenship, whether he had immigration documents allowing him to be in the United States, and how he crossed the border. Id. The defendant admitted he was a citizen of Mexico, lacked permission to be in the United States, and had entered illegally. The Ninth Circuit affirmed the district court's decision to admit the defendant's field statements. Id. at 830. The Ninth Circuit held that since the agent had reasonable suspicion to make a Terry stop, the agent could ask the defendant about his place of birth, his citizenship, whether he had permission to be in the United States and how he had crossed into the United States. Id. These questions were reasonably limited in scope to determining whether the defendant had crossed the border illegally. Id.

Here, as in the cases discussed above, there was no custodial interrogation requiring Miranda warnings. Agent Fernandez found Defendant and two other individuals hiding behind some cars in a public parking lot located approximately 50 yards north of the international border and 100 yards west of the Tecate, California Port of Entry. Defendant was contacted in a public place and was with two other individuals. As in Galindo-Gallegos and Cervantes-Flores, Agent Fernandez was investigating the illegal entry of suspects near the border and merely questioned Defendant as to his immigration status. Inquiry into Defendant's citizenship and legal status are considered investigatory questions. See United States v. Cervantes-Flores, 421 F.3d at 830. The investigatory stop did not rise to the level of a custodial interrogation necessitating Miranda warnings. Id.

Moreover, Agent Fernandez simply questioned Defendant as to his legal status and did not coerce Defendant to provide an answer to his questions. Indeed, Defendant makes no specific allegation of any coercive conduct on the part of Agent Fernandez who obtained Defendant's field statements. Therefore, Defendant's motion to suppress his field statements should be denied.

C. MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS

The Government opposes this request unless the motion is based upon newly discovered evidence not available to Defendant at the time of the motion hearing.

IV

CONCLUSION

For the foregoing reasons, the United States requests that Defendant's Motion be denied where opposed.

DATED: May 11, 2008.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. SERGIO MORA, Defendant.

Case No. 08CR1090-H

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, LUELLA M. CALDITO, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL, SUPPRESS STATEMENTS AND GRANT LEAVE FOR FURTHER MOTIONS on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Robert Carriedo

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 11, 2008

/s/ Luella M. Caldito
LUELLA M. CALDITO